In the

Supreme Court of the United States

October Term, 1976

No. 76-873

ARTHUR ANDERSEN & CO.,
Petitioner,

v.

STATE OF OHIO, THE HONORABLE SHERMAN G. FINESILVER, UNITED STATES DISTRICT JUDGE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF CERTIORARI

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INDEX

AUTHORITIES CITED

Cases:

Other Authorities:

Federal Rules of Civil Procedure

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Petitioner Arthur Andersen & Co. ("Andersen") submits this Reply Brief in support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("the Petition") and in response to two arguments in opposition to the granting of the Petition raised by Respondent, State of Ohio ("Ohio"), in the Brief For Respondent In Opposition, served on January 22, 1977 ("Brief"), which arguments are not addressed by Andersen in its Petition.

ARGUMENT

THE QUESTION PRESENTED FOR REVIEW— THE PROPRIETY OF THE ENTRY OF DIS-

COVERY ORDERS WHICH BY THEIR TERMS DIRECT ANDERSEN TO VIOLATE THE LAWS OF SWITZERLAND—HAS BEEN DECIDED FINALLY, AND ADVERSELY TO ANDERSEN, BY THE LOWER COURTS; THE QUESTION, THUS, IS ONE WHICH IS RIPE FOR REVIEW BY THIS COURT

In its Petition Andersen requests this Court to consider a single question—whether, in the circumstances presented by this case a United States Court may properly *enter* a discovery order which *by its terms* directs the discovered party to violate the criminal and civil laws of a friendly, foreign, sovereign state. Andersen's position is that a United States Court abuses its power by the entry of such an order and that the error thus committed is offensive to principles of fairness and, as significantly, is inimical to the political and economic interests of this country which are furthered by international comity and international trade.*

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*Ohio (Brief, pp. 15-16) mocks Andersen for addressing in its Petition the economic and political considerations which any court orders mandating conduct by a litigant in a foreign sovereign state necessarily call into play.

Apparently, Ohio would have this Court pretend that the dispute here is indistinguishable from any ordinary civil discovery dispute. This case, however, is manifestly not an ordinary civil discovery dispute between litigants with wholly domestic operations. Andersen is an international firm and, in addition, this case involves not only the interests of the litigants but also the interests of Switzerland—a foreign, sovereign state with which the United States has friendly relations—the national policy of which, as expressed in its criminal and civil statutes, unequivocally prohibits Andersen from doing that which Ohio has requested and that which the lower courts have directed.

Surely, the validity *vel non* of the lower courts' orders cannot be determined, fairly or properly, by pretending that the types of economic and political considerations which flow from the conflict between judicial proceedings in this country and the policies and laws of a foreign country—which considerations Andersen addresses in its Petition—are non-existent.

Ohio, in its Brief, nowhere explicitly states that Andersen's position on this question is wrong or that United States courts can, indeed, legally enter orders directing a party to act in violation of the laws of a foreign sovereign state. Rather Ohio seeks to persuade this Court to deny Andersen's Petition by raising two other claims: first, that no orders of the type described by Andersen have, *in fact,* been entered here; and, secondly (no matter what type of orders have been entered and no matter whether the entry of those orders was legal or not), that this Court should not review Andersen's Petition until such time as Andersen has disobeyed the discovery orders and been sanctioned for such disobedience.

We briefly address each of these contentions below.

I. The District Court Has Unequivocally And Dispositively Directed Andersen To Violate The Laws Of Switzerland And The Court Of Appeals Has Affirmed The Entry Of Those Orders

The first of Ohio's two claims is variously stated in Ohio's Brief. For example, Ohio suggests at one point that "the trial court has yet to rule finally . . . on the foreign law objections" (Brief, p. 1). It states later that "nobody is requiring Andersen to violate Swiss law" (Brief, p. 10) and that whether Andersen has been required to act in conflict with Swiss law is a "matter [which] remains open in the present case" (Brief, p. 13). And it represents that,

> "The trial court has already declared its willingness to entertain a proper showing that foreign law rather than tactical self-interest has prompted Andersen's resistance." (Brief, p. 14).

But, however stated, Ohio's single contention here appears to be that, in fact, Andersen has not been directed to vio-

late the laws of Switzerland and that therefore Andersen has nothing to complain about and the "Question Presented" in Andersen's Petition is a figment of Andersen's imagination.

This ostensibly "factual" claim by Ohio is simply wrong.* The language of the district court's discovery orders (see Appendices D, G and H to Andersen's Petition) includes no qualifications or modifications conditioning Andersen's obligation to comply upon compliance with Swiss law, nor do the orders reflect any disposition by the court to reconsider its thrice-repeated mandate *to produce*.

Indeed, the only material difference between the court's later orders and its first order of May 27, 1976 is that in the later orders the court established inflexible deadlines for compliance — deadlines fully effective *regardless* of whether Andersen then still faced the constraints of Swiss

*A considerable portion of Ohio's Brief (pp. 2-9) is devoted to a statement of other such purportedly "factual" claims. While Andersen disputes the accuracy of much of this putative chronology of proceedings, most of it is irrelevant to the legal question presented by our Petition and deserves no response. We do pause, however, to comment upon two facts which are relevant and may have been obscured by Ohio's dissertations upon the irrelevant.

First, however hard Ohio might strain to interpret otherwise the district court's unambiguous reference to this discovery dispute as being "peripheral" to this lawsuit (Brief, p. 13, n.2), the fact is that the district court said "peripheral" and, presumably, meant "peripheral." This characterization of the relevance, or relative irrelevance, to this case of the disputed documents is significant for the reasons discussed in Andersen's Petition, p. 14.

Secondly, the fact established below which has perhaps the greatest importance to deciding the validity of the district court's orders is ignored in Ohio's Brief, *i.e.*, Ohio does not dispute that in the record upon which the district court made its rulings, and upon which the Court of Appeals affirmed those orders, the opinions of Andersen's Swiss counsel interpreting and applying Swiss law stand *without any contradiction* in support of Andersen's position that the orders require Andersen to violate Swiss laws and, therefore, subject Andersen and its personnel to the possible imposition of grave sanctions.

law.* Those deadlines have passed; Andersen has been unable to produce all the documents in question in compliance with Swiss law; hence, because of the expiration of the stay issued by the Court of Appeals Andersen, in order to comply fully with the district court's orders, is again in the posture of being "required to violate Swiss law."

Ohio argues that (the language of the orders apparently aside) the district court has left a "door . . . open" to Andersen by having expressed during a hearing a willingness to consider expert testimony concerning Swiss law (Brief, pp. 8, 10-11). Had the district court in fact included *in its orders* language capturing the sense of these remarks, language to the effect that Andersen need only exert its best efforts to produce, consistent with the dictates of Swiss law, and/or language to the effect that the court, in monitoring the progress of the dispute, would take into consideration the requirements and prohibitions of Swiss law, this case would not be here: for, contrary to Ohio's representations to this Court (Brief, p. 6), Andersen's position has been, and remains, that it *will* exert every effort to effect the *lawful* production of the Geneva documents and that the court rightfully *can* "compel Andersen to do *whatever is lawfully permissible.*" (Petition, p. 10; emphasis in original). But the orders simply do not contain any such language; and, certainly, if the question presented by Andersen's Petition is otherwise deserving of review by this Court, the Petition should not be denied on the *assumption* or *speculation* that the district court meant something other than, and inconsistent with, what it said in its orders. Indeed, any such speculation would be unwarranted in view of the following statement by the district court:

*Ohio's representation to this Court that the district court "modified its initial ruling by [merely] directing Andersen to exert every effort" (Brief, p. 2) is flatly wrong (see, *e.g.*, Appendix H to Andersen's Petition).

"This Court is not of a view to establish or supervise a detailed blueprint for the discovery procedures in this regard." (Order of June 25, 1976, Appendix F to Petition, p. 78).

The Court of Appeals for the Tenth Circuit had no difficulty in recognizing that in fact the district court's orders unqualifiedly had directed Andersen to violate foreign law. For example, in rejecting certain of Andersen's arguments that court stated "we are not impressed by Andersen's contention that international comity prevents *a domestic court from ordering action which violates foreign law*" (December 1, 1976 Opinion of the Court of Appeals, Appendix B to Petition, p. 27; emphasis added), and in affirming the entry of the discovery orders the court held, "foreign law may not control local law. It cannot invalidate an order which local law authorizes" *(ibid.)*.

In sum, Ohio's suggestion to this Court that the discovery orders in question do not constitute final, and adverse, rulings on, and repudiations of, Andersen's foreign law claims is based upon a mis-statement of the record.

II. The Question Of Andersen's Good Faith And The Question Of What Sanctions May Be Imposed Upon Andersen By The District Court Are Both Irrelevant To The Question Andersen Requests This Court To Review

Ohio — anxious to avoid having this Court consider on the merits the substantive question Andersen's Petition presents for review — argues that any consideration of this question must be deferred pending further proceedings in the trial court. Thus, Ohio would have it that Andersen may not dispute the validity of the trial court's discovery orders until it has demonstrated its "good faith" by acting in compliance with the orders, *i.e.*, "a party may [not] assert

anti-disclosure laws as grounds for refusing to comply with discovery orders without first showing that it has exerted in good faith every effort to comply [with those orders] . . ." (Brief, p. 2). Relatedly, Ohio contends that the trial court's decision of Ohio's motion to impose sanctions upon Andersen somehow will illuminate the merits of the question presented (Brief, p. 17), and that, therefore, Andersen must delay exercising its rights to challenge orders which it believes are invalid until it has disobeyed them and been cited for contempt for so doing.

Contrary to Ohio's bald assertions of "tactics of avoidance" on Andersen's part, the record here strongly supports the finding that, while exercising in an orderly fashion its rights to challenge on appeal the validity of the district court's orders, Andersen, at the same time, has evidenced "good faith" through its efforts to comply with the court's peremptory orders (to the extent possible under Swiss law). Thus, the substantial progress in limiting the scope of this dispute which has been achieved since the entry of the district court's orders has resulted from *Andersen's* ongoing and, in effect, voluntary efforts to attempt to resolve the matter. This fact alone provides substantial evidence of Andersen's good faith and distinguishes Andersen's posture from that usually assumed by a party-litigant who is challenging the validity of a discovery order on appeal. Unlike the litigant who objects to a discovery order, appeals from its entry, and refuses to produce any of the material in question until its appellate recourse has been exhausted, even after Andersen had filed its several appeals and petition for writ of mandamus and prohibition and had secured from the Court of Appeals a stay of the discovery orders, it continued to "exert its efforts" to comply with those orders and, in fact, has complied to the full extent it is able to do so without violating the criminal law of Switzerland. Such efforts are continuing.

But Ohio's attempt to litigate the question of good faith at this stage of the proceedings is most fundamentally meaningless because that question simply is not relevant to the question raised by Andersen's Petition. Simply put, the district court's orders either are, or are not, lawful for reasons having nothing to do with whether Andersen's actions following the entry of those orders do, or do not, satisfy Ohio's arguments in respect of "good faith." For, if Andersen's position that the very entry of the discovery orders *directing a violation of Swiss law* was error and an abuse of power is correct, such error is not erased nor such abuse corrected by anything Andersen may, or may not, have done following the entry of the orders.

Nor is there any logic in claiming, as Ohio does (Brief, p. 2) that the invalidity of the discovery orders in issue can be asserted *only after* the party subject to the orders has attempted to comply with them.

This proposition makes sense only insofar as it suggests that, in the exercise of good faith, a party should make efforts to resolve a dispute by whatever *lawful* recourse is available even when the dispute has been precipitated by the entry of orders unlawful on their face. Thus, Andersen here has instituted and carried out and is continuing *lawful* practices intended to ameliorate the controversy. But surely —and particularly when, as here, it appears likely that the dispute cannot be mooted by such voluntary efforts—Andersen cannot fairly be barred—until it has exhausted completely all voluntary good faith efforts—from pursuing, in timely fashion, its rights to challenge such unlawful orders on appeal.

Ohio apparently counters these claims with its contention that Andersen's Petition, nonetheless, is made premature by the "common sense of the *Alexander* doctrine," Brief, p. 10—*i.e.*, the holding in *Alexander v. United States*, 201 U.S. 117 (1906), that a discovery order ordinarily is

not appealable in the absence of the imposition of a contempt citation upon the party objecting to the order. But the cases are legion in which appellate courts *have entertained* and *granted* petitions for writs of mandamus seeking to have unlawful discovery orders vacated, without considering at all the so-called contempt requirement. See, *e.g.*, *Sanderson v. Winner*, 507 F.2d 477 (10th Cir. 1974), *cert. denied*, 421 U.S. 914 (1975); *Pfizer, Inc. v. Lord*, 456 F.2d 545 (8th Cir. 1972); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348 (1971); *United States v. Hemphill*, 369 F.2d 539 (4th Cir. 1966). And, while in *Kerr v. United States District Court*, ... U.S. ...., 48 L.Ed. 2d 725 (June 14, 1976), this Court stressed the extraordinary nature of the remedy of a writ of mandamus it nowhere suggested that an otherwise meritorious petition challenging an unlawful discovery order should be denied because there had been no contempt proceeding below.

In any event, adoption of the "contempt" requirement here simply would serve no purpose—other than the negative one of delaying the resolution of the substantive question which Andersen *now* requests this Court to make until all parties and the trial court have spent valuable resources in the course of possibly extensive contempt hearings. The "contempt" rule may make sense when there is reason to put "a witness' [or party's] sincerity to the test of having to risk a contempt citation as a condition to appeal", *United States v. Fried*, 386 F.2d 691, 695 (2d Cir. 1967). Imposing stringent restrictions on the appealability of ordinary discovery orders similarly may make sense when to do otherwise would open appellate courts to an undesired "flood of appeals", *International Business Machines Corp. v. United States*, 480 F.2d 293, 298 (2d Cir. 1973). And, in certain cases, a contempt hearing might serve the useful purpose of supplementing a record which is incomplete. *United*

States v. Fried, supra, 386 F.2d at 695. But none of those circumstances is present here: as discussed above, p. 7, Andersen has amply demonstrated its "sincerity" by its willingness to work at the practicalities of complying with the district court's orders while concurrently challenging on appeal the validity of those orders; permitting appeal here would "open the door," if at all, to only that "small class of cases," to paraphrase *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949), in which parties and non-parties (here Andersen's personnel living and working in Switzerland) have been directed by a court of this country to violate the criminal laws of a friendly foreign country; and it is hard to imagine, for the reasons discussed above, pp. 7-9, how any hearings concerned with Andersen's alleged "bad faith" could supplement the record with anything of relevance to the question presented by Andersen's Petition.

Finally, Ohio's "prematurity" argument is in no way supported by its ostensible reliance (Brief, pp. 16-17) upon the following passage which it quotes from *Societe Internationale v. Rogers,* 357 U.S. 197, 208 (1958):

> "Whatever its reasons the petitioner did not comply with the production order. Such reasons, and the wilfulness or good faith of petitioner, can hardly affect the fact of non-compliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply."

Ohio suggests that these remarks reflect this Court's view that a district court requested to enter a discovery order with respect to discovery of documents or information located in a foreign country need not, indeed should not, consider any barriers to the effectuation of the requested discovery which the laws of that sovereignty may present until such time as the discovered party faces sanctions for its non-compliance. Those portions of the Court's holding in *Societe*

Internationale which are relevant to the question presented by Andersen's Petition, and which are discussed therein, pp. 14-15, establish, however, that Ohio's proffered interpretation of this single excerpt is mistaken. When read in context it is evident that the Court's quoted language (extracted by Ohio from Part II of the opinion, *Societe Internationale v. Rogers, supra,* 357 U.S. at 206-208) was directed only to the question of whether a district court derived its authority to dismiss a complaint for failure of a plaintiff to comply with a production order, from the former Rule 37, F.R. Civ. P., or from Rule 41(b), F.R. Civ. P.

CONCLUSION

For the reasons set forth above and in Andersen's Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit, the Petition should be granted.

Respectfully submitted,

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